Pengarah Tanah dan Galian Johor & Anor v Ungku Sulaiman bin Abd Majid & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–33 OF 2001
HELILIAH JCA, KN SEGARA AND RAMLY ALI JJCA
4 FEBRUARY 2010

Land Law — Acquisition of land — Acquisition by state authority — High Court held that claimed property was acquired under wrong section of the Land Enactment (No 1) 1950 and as such there was no acquisition — Appeal against decision — Whether acquisition of claimed property null and void — Whether redemption of claimed property by state improper — Whether trial judge erred in failing to take into consideration full import of public documents — Whether law of limitation could be applied — Land Enactment (No 1) 1950

The respondents, the lawful great grandchildren of the late Ungku Abdullah, were at all material times the co-administrators of the estate of Ungku Abdullah, which had 624 beneficiaries. The respondents deposed that the late Ungku Abdullah had died on 23 March 1893 leaving Geran 158, Lot 129, Bandaran Johor Bahru ('the claimed property'). It was further affirmed in the respondents' affidavit that the registered proprietor of the claimed property, the late Ungku Abdullah, had charged the same in favour of a chettiar in 1890 and that the claimed property had been illegally redeemed by the Johor State Government in 1895. The respondents relied on a letter dated 29 June 1998 from the State Legal Advisor Johor and the results of a search of the claimed property dated 28 May 1998 to assert that the claimed property had been unlawfully acquired by the Johor State Government under s 54 of the Land Enactment (No 1) 1950 ('the Enactment'). The respondents therefore sought, inter alia, a declaration that the acquisition by the Johor State Government under s 54 of the Enactment was null and void; a declaration that the subsequent transfer of the claimed property by the Johor State Government to the Federal Government was illegal and void under the law; and in the event that the acquisition was valid compensation and/or damages in respect of the claimed property. The thrust of the appellant's contention was that the respondent's claim was time barred. The appellant submitted that the matter relating to the redemption of the claimed property transpired in 1895 after the death of the late Ungku Abdullah and that the claimed property became vested in the Johor State Government based on the method in existence at that time. The respondents argued the acquisition was null and void and hence limitation did not set in and the claim was therefore not statute barred. The Assistant Director Lands and Mines, Johor filed an affidavit in reply (the appellant's affidavit in reply) wherein it was disclosed

that on the instructions of HRH the Sultan of Johor then, the claimed property was redeemed from a chettiar for an amount of RM8,000 and that the land became vested in the state after 12 years. These events were pieced together after referring to two public documents, namely the minutes of one Mr A Glencross, the Commissioner of Lands and Mines, Johor, from a confidential file and from the records of one JSH Cunyngham-Brown. Both these documents were appended as exhibits accompanying the affidavit. After considering the respondents' affidavits and the appellant's affidavit in reply the High Court held that since the claimed property was acquired under the wrong section of the Enactment there was in fact no acquisition and that the claimed property had not vested in the Johor State Government. It was also found that limitation had no application to the facts of the present case. The trial judge also concluded that the redemption had to be done with the prior consent and upon the instructions of the beneficiaries of the late Ungku Abdullah. This was the appellants' appeal against that decision.

Held, allowing the appeal with costs:

(1) The explanation that may be discerned from the affidavit of the Assistant Director of Lands and Mines, Johor, and the exhibits accompanying it provide an amalgam of credible evidence that clarify the status of the claimed property. In this appeal it was highlighted that the claimed property that had been charged by the late Ungku Abdullah to the chettiar was at the instance of HRH the Sultan restored to the state in order to compensate the chettiar. This fact had not been traversed by the respondents. In addition, since there was a dearth of explanation as to the steps taken by the family of the late Ungku Abdullah then, the land remained vested with the state. The trial judge had failed to give proper judicial appreciation to the appellant's affidavit in reply and the exhibits appended thereto. This failure to have a judicial appreciation of such matters amounted to a misdirection (see paras 29–30).

(2) The trial judge erred in failing to take into consideration the full import of the contents of the minutes of A Glencross. This consequently had caused the trial judge to assume that the land legislation applicable to the facts of the appeal had to be the Enactment. However, this Enactment itself indicated that as at 1910 there was already in place a legislation pertaining to land. Further, the redemption took place in 1895 and as between 1895 and 1910 fifteen years had transpired. It was therefore a fallacy to determine whether the Enactment was the appropriate legislation in order to consider the validity of the vesting of the property prior to 1935 and the reference to s 54 of the Enactment was irrelevant. That section was only invoked by the State Legal Advisor Johor to properly vest the land in the government of the State of Johor. Factually the property was redeemed in accordance with the law then in

force and the respondents had failed to adduce any evidence to show that the redemption was improper (see paras 32–37, 40).

(3) Owing to the misdirection that had occurred in accepting the Enactment as the appropriate legislation to consider, the trial judge had committed a further misdirection in determining that the law of limitation did not apply. 12 years was the number of years when the limitation period could have set in but the respondents' notice of motion as filed one hundred and four years later (see paras 39, 47 & 48).

(4) On the totality of evidence the respondents had failed on the balance of probabilities to prove that there had occurred an illegal deprivation of title to the claimed property. Their claim originated from a misconceived position that s 54 of the Enactment was applicable (see paras 49–50).

[Bahasa Malaysia summary

Responden-responden, cicit arwah Ungku Abdullah yang sah, pada setiap masa yang material adalah pentadbir bersama harta pusaka Ungku Abdullah, yang mempunyai 624 benefisiari. Responden-responden bersumpah bahawa arwah Ungku Abdullah meninggal dunia pada 23 Mac 1893 meninggalkan Geran 158, Lot 129, Bandaran Johor Bahru ('harta yang dituntut'). Selanjutnya diakui dalam afidavit responden-responden bahawa pemilik berdaftar harta yang dituntut, arwah Ungku Abdullah, telah mencagarkan harta tersebut kepada seorang chettiar pada 1890 dan bahawa harta yang dituntut telah diambil secara tak sah oleh Kerajaan Negeri Johor pada tahun 1895. Responden-responden merujuk kepada surat bertarikh 29 Jun 1998 daripada Penasihat Undang-Undang Negeri Johor dan hasil kajian ke atas harta yang dituntut tersebut bertarikh 28 Mei 1998 bagi menegaskan bahawa harta yang dituntut telah diambil secara tak sah oleh Kerajaan Negeri Johor di bawah s 54 Enakmen Tanah (No 1) 1950 ('Enakmen'). Oleh itu, responden-responden memohon, antara lain, suatu perisytiharan bahawa pemerolehan oleh Kerajaan Negeri Johor di bawah s 54 Enakmen adalah batal dan tak sah; suatu perisytiharan bahawa pindah milik selanjutnya harta yang dituntut itu oleh Kerajaan Negeri Johor kepada Kerajaan Pusat menyalahi undang-undang dan tak sah; dan jika pemerolehan tersebut sah, pampasan dan/atau ganti rugi untuk harta yang dituntut tersebut. Tunjang hujahan perayu adalah bahawa tuntutan responden-responden dihalang had masa. Perayu berhujah bahawa perkara berkaitan penebusan harta yang dituntut berlaku pada 1895 selepas kematian arwah Ungku Abdullah dan bahawa harta yang dituntut menjadi terletak hak kepada Kerajaan Negeri Johor berdasarkan peraturan yang wujud pada masa itu. Responden-responden berhujah bahawa pemerolehan tersebut adalah batal dan tak sah dan oleh itu, tiada had masa dan tuntutan tersebut tidak dihalang oleh had masa. Timbalan Pengarah Tanah dan Galian Johor memfailkan

afidavit jawapan (afidavit jawapan perayu) yang mana mendedahkan bahawa atas titah Yang Mulia Sultan Johor pada masa itu, harta yang dituntut ditebus daripada seorang chettiar dengan harga RM8,000 dan bahawa tanah tersebut menjadi terletak hak kepada kerajaan negeri selepas 12 tahun. Peristiwa-peristiwa ini dihubungkaitkan setelah merujuk kepada dua dokumen awam, iaitu, minit-minit A Glencross, Pesuruhjaya Tanah dan Galian Johor daripada satu fail sulit dan daripada rekod-rekod JSH Cunyngham-Brown. Kedua-dua dokumen tersebut dilampirkan sebagai ekshibit-ekshibit afidavit tersebut. Setelah mempertimbangkan afidavit responden-responden dan afidavit jawapan perayu Mahkamah Tinggi memutuskan bahawa memandangkan harta yang dituntut tersebut diperoleh menerusi seksyen yang salah di bawah Enakmen tersebut, maka tiada pemerolehan berlaku dan bahawa harta yang dituntut tersebut tidak terletak hak kepada Kerajaan Negeri Johor. Juga diputuskan bahawa had masa tidak terpakai kepada fakta-fakta kes ini. Hakim bicara juga memutuskan bahawa penebusan tersebut haruslah dibuat atas kebenaran dan atas arahan benefisiari-benefisiari arwah Ungku Abdullah. Ini merupakan rayuan perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Penjelasan yang mungkin boleh dilihat daripada afidavit Timbalan Pengarah Tanah dan Galian Johor dan ekshibit-ekshibit yang dilampirkan bersama membentuk jalinan keterangan yang boleh dipercayai yang menjelaskan status harta yang dituntut itu. Dalam rayuan ini, ditekankan bahawa harta yang dituntut tersebut yang telah dicagarkan oleh arwah Ungku Abdullah kepada chettiar telah ditebus oleh Yang Mulia Sultan kepada kerajaan negeri untuk memampas chettiar itu. Fakta ini tidak disangkal oleh responden-responden. Tambahan lagi, memandangkan penjelasan yang kurang terhadap langkah-langkah yang diambil oleh keluarga arwah Ungku Abdullah pada masa itu, tanah tersebut tetap terletak hak pada kerajaan negeri. Hakim bicara gagal membuat penilaian kehakiman yang tepat ke atas afidavit jawapan perayu dan ekshibit-ekshibit yang dilampirkan bersama. Kegagalan membuat penilaian kehakiman atas perkara tersebut menyebabkan salah arah (lihat perenggan 29–30).

(2) Hakim bicara telah khilaf apabila gagal mempertimbangkan mesej sepenuhnya isi kandungan minit-minit A Glencross. Akibatnya, hakim bicara menganggap bahawa undang-undang tanah yang terpakai kepada fakta-fakta rayuan tersebut adalah Enakmen tersebut. Walau bagaimanapun, Enakmen tersebut menyatakan bahawa dalam tahum 1910 sudah wujud undang-undang berkenaan tanah. Selanjutnya, penebusan tersebut berlaku pada tahun 1895, dan antara 1895 hingga 1910, 15 tahun telah berlalu. Maka adalah merupakan satu kesilapan untuk menentukan sama ada Enakmen tersebut adalah undang-undang

yang sesuai dalam mempertimbangkan kesahan peletakhakkan harta yang dituntut itu sebelum 1935 dan rujukan kepada s 54 Enakmen adalah tidak relevan. Seksyen tersebut hanya digunapakai oleh Penasihat Undang-Undang Negeri Johor untuk meletakhakkan dengan betul tanah tersebut kepada Kerajaan Negeri Johor. Secara faktanya, harta tersebut telah ditebus menurut undang-undang yang berkuat kuasa pada masa itu dan responden-responden gagal mengemukakan apa-apa keterangan untuk menunjukkan bahawa penebusan tersebut tidak sah (lihat perenggan 32–37, 40).

(3) Disebabkan salah arah kerana menerima pakai Enakmen tersebut sebagai undang-undang yang sesuai untuk dipertimbangkan, hakim bicara telah melakukan salah arah lagi dalam menentukan undang-undang had masa tidak terpakai. 12 tahun merupakan had masanya tetapi notis usul responden-responden difailkan 104 tahun kemudian (lihat perenggan 39, 47 & 48).

(4) Pada keseluruhan keterangan, responden-responden gagal atas imbangan kebarangkalian untuk membuktikan bahawa telah berlaku perampasan hak milik harta yang dituntut itu. Tuntutan mereka berasaskan salah tanggapan bahawa s 54 Enakmen terpakai (lihat perenggan 49–50).]

Notes

For cases on acquisition by state authority, see 8 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1864–1865.

Cases referred to

Dato' Yap Peng v PP [1993] 1 MLJ 337, HC (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1994] 1 MLJ 592, HC (refd)

Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd [1996] 3 MLJ 692, CA (refd)

Legislation referred to

Evidence Act 1950 ss 35, 42, 54, 56, 57, 74
Land Enactment (No 1) 1950 ss 1(ii), 54
Laws of the Constitution of Johore art 13
Limitation Act 1953 ss 34, 35
Limitation Enactment No 23 s 3, Part II
Rules of the High Court 1980 O 41 r 5

Appeal from: Notice of Motion No 25–31 of 1998 (High Court, Johor Bahru)

Abdul Rahman Putra bin Taha (State Legal Advisor, Johore) (Lee Chee Thim with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Bastian Pius Vendargon (PK Nathan with him) (Bastian Vendargon) for the respondents.

Heliliah JCA (now FCJ) (delivering judgment of the court):

[1] This is an appeal lodged by the appellants (the respondents in the court below) against the decision of the High Court given on 11 April 2001. The respondents in this appeal (the applicants in the court below) had moved the High Court to obtain certain orders. The orders sought are:

(a) an extension of time to file an application for the following;

(b) a declaration that the property (identified as Geran 158, Lot 129, Bandaran Johore Bahru or ('the claimed property') redeemed by the government in 1895 and the acquisition thereof was illegal;

(c) a declaration that the acquisition by the Johor State Government under s 54 of the Land Enactment (No 1) 1950 was null and void;

(d) a declaration that the transfer of the claimed property by the Johore State Government to the Federal Government was illegal and void under the law; and

(e) in the event that the acquisition is valid, the applicants apply that compensation and/or damages be paid to them in respect of the claimed property.

[2] The learned trial judge granted practically all the orders. We have unanimously allowed this appeal and we now state the reasons.

[3] Before dealing with the issues the particulars material to this appeal need to be mentioned as follows:

(a) the respondents are the co-administrators of the estate of the late Ungku Abdullah who was also known as Ungku Abdullah Temenggong Daing Ibrahim and that estate was in relation to a property located in Johor Bahru measuring 6 acres. O rood. 30 poles held under *Geran 158, Lot 129, Bandaran Johor Bahru*;

(b) it was deposed that Ungku Abdullah died on *23 March 1893* leaving the said property in question;

(c) by way of petition for a letter of administration dated *26 June 1996*, which was extracted on *13 January 1998*, the Johor Bahru High Court

vide *Petition No 31–112 of 1995* appointed both the applicants, *who were the lawful great grand children of the late Ungku Abdullah*, as co-administrators of the estate of the late Ungku Abdullah;

(d) the estate of the late Ungku Abdullah referred to the claimed property in dispute under the 'schedule of the property of the abovenamed deceased';

(e) the 'FARAID' certificate issued by the Kadi's office at Johor *showed that there were 624 beneficiaries* to the estate of Ungku Abdullah;

(f) the registered proprietor of the said property was Ungku Abdullah;

(g) the respondents deposed that the said property in question was charged in favour of a chettiar in *1890* by Ungku Abdullah, who later died on *23 March 1893*; and

(h) the government had purportedly redeemed the said property in 1895.

[4] At the outset it is pertinent to mention certain passages from the judgment of the High Court. Those passages encapsulate the core problem and are as follows:

> ... The respondents were not able to trace the relevant documents to bolster up their case while the applicants were the victims of an acquisition exercise which ran foul of the law in that the wrong section of the Land Enactment (No 1) was utilised. Not only that, the beneficiaries of the late Ungku Abdullah were not informed in regard to the redemption of the said property by the Johore State Government. In fact, the consent of the beneficiaries of the late Ungku Abdullah were not obtained before the Johore State Government proceeded to redeem the said property. To add insult to injury, no formal inquiry was ever held before the said property was purportedly acquired by the Johore State Government.
>
> The whole strength of the applicants' case hinged on the acquisition exercise that was done on 24 October 1950 under the wrong section of the Land Enactment (No 1). *Since the said property was acquired under the wrong section of the Land Enactment (No 1), there was in fact no acquisition at all undertaken by the Johore State Government and, consequently, the said property was never vested in the Johore State Government*. The ownership of the said property remained throughout and to this day as the estate of the late Ungku Abdullah and that estate had not been distributed to the beneficiaries as yet. When the said property was purportedly acquired on 24 October 1950, time remained still and the rigours of the law of limitation was not activated at all. In fact the law of limitation was not applicable to the facts of the present case. In so holding, I must impose a caveat. I am not extending nor postponing the limitation period in favour of the applicants. *This was a case where the law of limitation plays no part at all. In 1895 the Johore State Government redeemed the said property it was an act of benevolence: very friendly, very helpful and very charitable gestures — notwithstanding the fact that the beneficiaries of the late Ungku Abdullah were not told nor were their consents obtained before the redemptions was undertaken*. After the said property had been redeemed in 1895,

the Johore State Government purportedly held the title to the said property in total disregard to the legal rights of the beneficiaries of the late Ungku Abdullah. Surely the beneficiaries of the late Ungku Abdullah ought to be recognised by the Johore State Government when the said property was redeemed in 1895; they should not be side stepped since they are entitled, in law, to the estate of the late Ungku Abdullah.

In my judgment, the law of limitation has no application to the facts of the present case. Since the said property was wrongly acquired under the wrong section of the Land Enactment (No 1), time remained at large and the law of limitation was inapplicable and it cannot govern the outcome of the present case at all. The law books are replete with authorities on the law of limitation. *It would do justice to refer to some of them even though they have no bearing at all to this case.*

[5] The thrust of the appellant's contention is that the claim is time barred. The respondents succeeded on the basis that the acquisition was null and void and hence limitation did not set in and the claim was therefore not statute barred.

[6] The averments of the respondents relied upon by the trial judge are contained in two affidavits. However the second affidavit did not introduce any new fact or evidence relating to the matter of the claim of the respondents. The salient paragraphs that need mention in the context of this appeal are found in the affidavit deposed to by the first respondent (or Ungku Sulaiman's) affidavit which are as follows:

6. Mengikut bukti yang tercatit dalam Geran 158 tersebut tuanpunya tanah yang berdaftar pada setiap masa material adalah Y.M. Ungku Abdullah.

7. Kami juga telah difahamkan bahawa tanah tersebut telah digadaikan oleh Allahyarham Ungku Abdullah kepada seorang Chetti dalam tahun 1890 dan telah meninggal dunia pada 23hb Mac 1893. Tanah tersebut telah ditebus oleh Kerajaan dalam tahun 1895.

   Sesalinan surat dari Jabatan Undang-Undang Negeri Johor bertarikh 27hb Ogos 1972 dilampirkan dan ditandakan sebagai 'A-3'.

8. *Hartanah tersebut telah diambil alih oleh Kerajaan Negeri Johor di bawah Seksyen 54, kepada Land Enactment melalui CL&M 18/1932 bertarikh 24hb Oktober 1950, CL&M 226/1950.*

   Sesalinan surat dari Pejabat Penasihat Undang-Undang Negeri bertarikh 29hb Jun 1998 dan sesalinan carian hakmilik dari Pejabat Tanah Dan Galian, Negeri Johor bertarikh 28hb Mei 1998 dilampirkan dan ditanda sebagai 'A-4'.

9. Melalui warta G.N.386 bertarikh 10hb Mei 1951, tanah tersebut telah dijadikan rizab untuk 'Telecom Exchange Building Maintained by the Controller of Telecoms Johor.'

Sesalinan warta G.N.386 bertarikh 10hb Mei 1951 dilampirkan dan ditanda sebagai 'A-5'.

10. *Kerajaan Negeri Johor telah mengambil alih tanah tersebut* tanpa memberitahu dan tanpa membayar apa jua pampasan dan/atau gantirugi kepada tuanpunya hartanah tersebut atau waris-waris Y.M. Ungku Abdullah yang masih ada.

11. Kerajaan Negeri telah mengambil alih hartanah tersebut dan telah memindah milik sebahagian hartanah tersebut kepada Kerajaan Persekutuan untuk membina Jabatan Telekom. Kami telah meminta pengesahan dari Jabatan Telekom mengenai pengambilalihan hartanah tersebut melalui surat bertarikh 26hb Ogos 1998. Selanjutnya Jabatan Telekom telah memberi pengesahannya melalui surat bertarikh 28hb Ogos 1998.

Sesalinan surat bertarikh 26hb Ogos 1998 dan sesalinan surat bertarikh 28hb Ogos 1998 dari Telekom Malaysia dilampirkan dan ditandakan sebagai 'A-6'.

12. Kami telah dinasihatkan oleh Peguam kami, Encik Teh Poh Teik, dan kami sesungguhnya percaya bahawa pengambilan hartanah tersebut oleh Kerajaan Negeri di bawah Seksyen 54 tersebut adalah tidak berasas dan tak sah di sisi undang-undang. Ini adalah kerana tidak ada kuasa yang termaktub di bawah Seksyen 54 itu yang membenarkan atau membolehkan Kerajaan Negeri mengambil hartanah tersebut tanpa pengetahuan tuanpunya hartanah atau waris-warisnya.

13. Dengan itu kami menuntut dari Kerajaan Negeri Johor untuk menyerahkan balik hartanah tersebut. Sekiranya Kerajaan Negeri tidak dapat menyerahkan balik hartanah tersebut, kami menuntut Kerajaan memberi pampasan dan/atau gantirugi kepada kami dan waris-waris yang lain, yang telah dinafikan haknya.

14. Tuntutan kami terhadap Kerajaan ini adalah lewat dan semenjak kerajaan mengambil alih tanah tersebut tidak ada apa-apa tindakan diambil untuk meminta balik tanah itu daripada Kerajaan kerana pada masa itu waris-waris yang rapat tidak tahu siapakah yang memiliki suratmilik tersebut setelah tuanpunya tanah meninggal dunia.

15. Kami juga percaya bahawa waris-waris tersebut tidak berkemampuan dan tiada yang mahu mengusahakan cara mengambil kuasa atas harta si mati.

Pada masa itu hampir semua orang takutkan baginda DYMM Sultan Ibrahim ibni Sultan Abu Bakar. Lebih-lebih lagi kerabat-kerabat baginda yang telah menerima pencen bulanan kerabat takutkan baginda DYMM Sultan akan menarik balik pencen kerabat mereka. Pada masa itu adalah juga diketahui bahawa mereka telah beberapa kali 'diugut' bahawa pencen mereka akan ditarik balik sekiranya mereka melakukan sesuatu yang akan mengakibatkan ketidakpuasan baginda DYMM Sultan.

[7] The Notice of Motion No 25–31 of 1998 that was filed with some amendments was dated 24 September 1998. The significance of mentioning

this date is that the declaratory orders that are sought for are being filed about 104 years after the demise of the late Ungku Abdullah Temenggong Daing Ibrahim! While the deponent Ungku Sulaiman claims as one of the 'cicit-cicit yang sah' the same affidavit reveals that in effect that there are '624 waris' (descendents). The claimed property has been identified in the Schedule filed with the petition for letters of administration by the respondents. It has to be noted that while the appellants claim as cicits (grandchildren or even great great grandchildren) under personal law *the claim to the property is determined according to the land law in force*. The learned trial judge in his grounds of judgment stated, inter alia, that '... Both the applicants further deposed that the said *property had been acquired by the Johore State Government under s 54 of the Land Enactment (No 1)* vide CL&M 18/32 dated 24 October 1950, CL&M 226/1950'. The respondents also relied on the letter from the State Legal Advisor Johor dated 29 June 1998 written in Bahasa Malaysia exh A4. The contents are:

Ruj. Tuan: CC/m/20417/93/AN

Ruj. Kami: PUNJ.131/16/N

Tarikh: 29hb. Jun 1998

Tetuan Lim & Hooi,

3rd. Floor, UMNO Building,

Jalan Segget,

80000 JOHOR BAHRU.

Tuan,

Tuntutan Bayaran Pampasan Dan/Atau Gantirugi Atas Geran Melayu No. 158 Lot 129 Bandar Johor Bahru

Kami merujuk kepada surat tuan bertarikh 15 Mei 1998 mengenai perkara tersebut di atas.

2. Adalah dimaklumkan bahawa, berdasarkan kepada rekod kami, Almarhum Ungku Abdullah telah menggadaikan tanah tersebut di atas kepada seorang Chetti dalam tahun 1890 dan Almarhum telah mangkat pada 23 Mac 1893. Tanah tersebut telah *ditebus oleh Kerajaan* dalam tahun 1895 dan seterusnya Kerajaan telah mengambilalih tanah tersebut menjadi hak Kerajaan pada 24 Oktober 1990.

3. Melalui warta G.N. 386 bertarikh 10 Mei 1951, tanah tersebut telah dijadikan rizab untuk Telecom Exchange Building maintained by the Controller of Telecoms Johor.

4. Ingin kami maklumkan juga bahawa tindakan terhadap Kerajaan tidak boleh diambil kini kerana dihalang oleh Akta Sekatan Masa (Limitation Act).

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,
(ABDUL RASID BIN SUDIN)
b.p. PENASIHAT UNDANG-UNDANG NEGERI,
JOHOR.

[8] Attached to that letter is the result of a search made dated 28 May 1998:

PEJABAT TANAH DAN GALIAN NEGERI JOHOR

TARIKH CARIAN : 28 HARIBULAN MEI, 1998 NO. SIRI : 4028
T/T PENYELIA : _____

MAKLUMAT CARIAN HAKMILIK Muka : 1

BUTIRAN HAKMILIK :

1. DAERAH	:	JOHOR BAHRU
2. MUKIM	:	BANDAR JOHOR BAHRU
3. NO. HAKMILIK	:	GERAN MELAYU NO. 158
4. NO. LOT	:	129
5. KATEGORI TANAH	:	PERSAORANGAN
6. PAJAKAN	:	TIDAK HABIS TEMPOH TIDAK
7. KELUASAN TANAH	:	6E.OR. 30 POLES METER PERSEGI
8. CUKAI TAHUNAN	:	TIADA
9. STATUS TANAH	:	GERAN MELAYU
10. JENIS GUNA TANAH	:	BANGUNAN
11. SYARAT NYATA	:	TIADA
12. SEKATAN KEPENTINGAN	:	TIADA
13. TARIKH HAKMILIK DIDAFTARKAN		4 HARIBULAN RABI'E LAKHIR, 1297 (1877)
14. TARIKH MULA-MULA DIBERI MILIK	:	SEPERTI DI ATAS
15. NO. HAKMILIK ASAL	:	YANG MULIA UNGKU ABDULLAH DIKENALI JUGA SEBAGAI UNGKU ABDULLAH BIN TEMENGGONG DAING IBRAHIM
16. NO. HAKMILIK AKHIR SEKALI	:	TANAH INI TELAH DIAMBILALIH OLEH KERAJAAN NEGERI JOHOR DIBAWAH SEKSYEN 54 KEPADA LAND ENACTMENT MELALUI C.L. & M. 18/1932 BERTARIKH 24 HARIBULAN OKTOBER, 1950 C.L. & M. 226/1950.

[9] The results of a search of the details of the claimed property as mentioned above were also relied upon by the respondents to assert that the claimed property had been unlawfully acquired by the state government. The respondents specifically depended on the following statement in the document, that is, '... Tanah ini telah di ambil alih oleh Kerajaan Negeri Johor di bawah seksyen 54 Land Enactment melalui CL&M18/1932 bertarikh 24 haribulan October,1950 C.L.&M228/1950.' The letter from the state legal advisor however uses the term 'tebus' (redeem). 'Ambil alih' when translated means 'take over'.

[10] Three issues were addressed in the grounds of judgment and they are as follows:

(a) Whether the Johore State Government could redeem the said property through Messrs Peterson Simmon & Co without the prior consent and instructions of the beneficiaries of the late Ungku Abdullah and whether such redemption was in accordance with the law and/or valid in law.

(b) Whether the acquisition of the said property under s 54 of the Land Enactment (No 1) vide CL&M 18/1932 dated 24 October 1950 and CL & M 228/1950 was null and void.

(c) Whether the law of limitation could be applied in the present case when the said property was acquired under the wrong section of the Land Enactment (No 1).

[11] First and second issues are really interrelated. It is on the first issue however that some confusion could be detected. The judge had concluded that the redemption (tebus) must be done with the prior consent and upon the instructions of the beneficiaries of the late Ungku Abdullah. In considering this it is clear that there were certain documents referred to in the course of filing the affidavits. However it is also discerned from the judgment that a determination of fact is made that *at the time when the property was taken by the Johore State Government, no set procedures were followed*. The contention advanced by the state legal advisor was that the matter relating to the redemption of the claimed property transpired in 1895 after the death of the late Ungku Abdullah on 23 March 1893 and the claimed property became vested in the Johore State Government based on the method in existence at that time. Unfortunately however the state legal advisor also conceded that there was at that time an absence of any law that was clearly applicable then. It is noted that, on account of the concession of the state legal advisor, the trial judge accepted the specious arguments of the counsel for the respondents that the Land Enactment (No 1) was indeed the governing law. In making this deduction the judge also referred to the following statements found in the affidavit in reply filed by the Assistant Director Lands and Mines, Johor (or Syubanah's affidavit) the relevant parts of which are as follows:

...

4. Saya sesungguhnya mempercayai bahawa tanah yang dipegang di bawah *Geran Melayu No. 158 Bandar Johor Bahru* (selepas daripada ini disebut sebagai 'tanah tersebut') telah digadai oleh pemilik berdaftarnya ketika itu ialah Almarhum Ungku Abdullah kepada seorang chettiar dalam tahun 1890 *dan telah ditebus oleh Peterson Simmon & Co. bagi pihak Kerajaan Johor* dengan membayar *$8,000.00* dalam tahun 1895 selepas mangkatnya Almarhum Ungku Abdullah. Sejak dari tahun 1895 tersebut, geran tanah tersebut berada dalam *simpanan Kerajaan Johor sehinggalah peguam Rodyk And Davidson memaklumkan dalam tahun 1908 bahawa tanah tersebut*

'terserah jadi hak dan milik Kerajaan kerana telah lebih daripada 12 tahun dalam pegangannya dan tiada boleh dituntut oleh sesiapa lagi.

Sesalinan minit oleh A. Glencross dalam fail ruj. no. CLM.18/32 bertarikh 27-12-1953 dilampirkan dan ditanda sebagai ekshibit 'SY-1'.

5. Petikan daripada minit terdahulu dalam fail ruj. no. CLM. 18/32 jelas menunjukkan bahawa tanah tersebut telah diambil balik oleh Kerajaan Johor dalam tahun 1932 setelah Kerajaan Johor menebus tanah tersebut terdahulu daripada itu atas titah perintah DYMM Sultan dan seterusnya tanah berserta bangunan menjadi milik Kerajaan. Petikan tersebut tertulis seperti berikut:

It comprises the whole of Malay Gt: 158 Johor Bahru Town, which was acquired by the Govt. In 1932, the original owner Ungku Abdullah having died whilst the land remained charged to a chettiar. Govt. redeemed the charge on H.H's order and both land and buildings now vest in the State.

Sd. J.S.H. Cunyngham-Brown

CL+M 3/11

Saya sesungguhnya mempercayai bahawa berdasarkan kepada kaedah dan undang-undang yang wujud ketika itu (iaitu tahun 1890an), penebusan tanah tersebut oleh Kerajaan Johor dengan bayaran sebanyak *$8,000.00* kepada chettiar tersebut atas titah perintah DYMM Sultan boleh menyebabkan tanah tersebut menjadi milik Kerajaan Johor sebagaimana yang dapat dilihat dari contoh pengindorsan yang terdapat dalam *Geran No. 7 Bandar Johor Bahru*.

Sesalinan kertas minit yang ditulis oleh J.S.H. Cunyngham-Brown 03-11-1950 dilampirkan dan ditanda sebagai ekshibit 'SY-2'.

Sesalinan Geran No. 7 Bandar Johor Bahru dilampirkan dan ditanda sebagai ekshibit 'SY-2A'.

6. Saya sesungguhnya percaya bahawa berikutan dengan perkara yang dinyatakan di atas, Kerajaan Johor sebagai pihak yang menuntut kepentingan dalam tanah tersebut, telah menggunakan peruntukan di bawah Sesyen 54 Enakmen Tanah 1935 (Enakmen No. 1) untuk memohon kepada Pesuruhjaya Tanah Dan Galian Johor untuk satu perintah supaya daftar diperbetulkan (rectified) dan satu pengindorsan dibuat bahawa tanah tersebut telah diambilalih oleh Kerajaan Johor.

7. Selaras dengan permohonan tersebut, Pesuruhjaya Tanah Dan Galian Johor telah membuat satu pengindorsan dalam dokumen hakmilik tanah tersebut pada 24-10-1950 bahawa ia kini telah menjadi tanah Kerajaan di bawah Seksyen 54 Enakmen Tanah sebagaimana dalam fail ruj. no. CLM. 18/1932.

Sesalinan Geran Melayu No. 158 Bandar Johor Bahru dilampirkan dan ditanda sebagai ekshibit 'SY-3'.

Sesalinan Carian atas Geran Melayu No. 158 Bandar Johor Bahru dilampirkan dan ditanda sebagai ekshibit 'SY-4'.

8. Saya sesungguhnya percaya bahawa harga penebusan tanah tersebut sebanyak $8,000.00 yang dibuat oleh Kerajaan kepada chettiar yang berkenaan adalah sama dan selaras dengan nilai dan gadaian atas tanah tersebut ketika itu, dan kini adalah tidak wajar bagi Kerajaan Negeri Johor membayar apa-apa jua bentuk pampasan atau gantirugi kepada Pemohon-Pemohon ataupun waris-waris Almarhum Ungku Abdullah yang lain.

9. Saya juga menegaskan bahawa perizaban tanah tersebut untuk '*Telecom Exchange Building Maintained by the Controller of Telecoms Johor*' melalui warta *G.N. 386* bertarikh *10-05-1951* adalah sah di sisi undang-undang dan perizaban bagi tujuan tersebut tidaklah boleh terhenti sebagaimana diperuntukkan dalam Perlembagaan Persekutuan.

10. Saya sesungguhnya mempercayai bahawa perkara tentang penebusan serta pengambilalihan tanah tersebut oleh Kerajaan telah diketahui oleh waris-waris Almarhum Ungku Abdullah dan tuntutan terhadap hakmilik ke atas tanah tersebut telah dibuat oleh waris-waris Almarhum Ungku Abdullah seawal tahun 1908 lagi dan semuanya menemui kegagalan. Tindakan undang-undang sepatutnya telah dibuat seawal tahun 1908 tersebut.

    Sesalinan surat dari Pengarah Tanah Dan Galian Johor kepada YM Ungku Ibrahim bin Ungku Ahmad bertarikh 18-07-1975 dilampirkan dan ditanda sebagai ekshibit 'SY-5'.

11. Sehingga kini saya percaya bahawa perkara tersebut telah berlaku lebih daripada seratus (100) tahun dan adalah tidak wajar Surat Kuasa Mentadbir bertarikh 26-06-1996 dijadikan alasan bagi mendapatkan kembali tanah tersebut yang dahulunya telah bertukar milik menurut undang-undang dan kaedah yang wujud ketika itu. ....

[12] It is essential to state that the evidence adduced before the trial judge are all by way of affidavit evidence. Hence it is necessary to refer to O 41 r 5 of the Rules of the High Court 1980 ('RHC 1980') that stipulates:

(1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[13] It is found that the evidence relied upon by the respondents are countered with explanations by the appellants. This is materially found in

Syubanah's affidavit. The statements in *Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692, per Gopal Sri Ram (now FCJ) are apt:

> The principles that govern a case of this nature, where a court is called upon to make a determination based on affidavit evidence, are well-settled and free from any doubt. In *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (f)* [1984] 1 MLJ 160 at p 163, Lee Hun Hoe CJ (Borneo), when delivering the judgment of the former Federal Court, said:
>
> > Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong*'s case (*Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212) at p 217:
> >
> > > ... In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since it is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong ...
>
> In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436, Lord Templeman said:
>
> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[14] The affidavit in reply of Syubanah detailed above disclosed several matters, inter alia, as follows:

(a) on the instructions of HRH the Sultan then, the land was redeemed from a chettiar for an amount of RM8,000 through Peterson Simmon & Co;

(b) Exhibit SY2 referred to minutes the contents of which again reflected that the original owner Ungku Abdullah died while the land remained charged to a chettiar. The government redeemed the charge on the orders of the Sultan and the land became vested in the state after 12 years. This particular aspect was apparently recorded by one JSH

Cunyngham-Brown. The same minutes also contained the statement 'It comprises the whole of Malay Gt: 158 Johore Bahru Town, which was acquired by the Govt. in 1932, …' At the end of the minute is the name and the annotation CL & M3/11. The minutes were recorded in the years 1950 as well 1951. It was in this context that the word 'acquired' is found.

(c) The minutes of A Glenncross with file reference CLM 18/32 dated 27 December 1953 outlines the developments pertaining to the land. It is observed that the minutes of Mr A Glencross are extracted from a confidential file. It is noteworthy that the contents of these minutes also elucidate the steps that have been undertaken in respect of the land.

[15] Since the contents of the abovementioned minutes of Mr A Glencross have been made in his official capacity, it is considered appropriate to reproduce the entire exh SY1 as the contents are self explanatory.

Ref: CLM.18/32 (Conf.)

Malay Grant No. 158.

This is a very old matter indeed. The land (Malay Grant 158) was alienated to Ungku Abdullah bin Ibrahim in 1877. It has been in the possession of Government since 1895. How it came into the possession of Government is set out in the following minute in S.S. 3898/31:-

Dato Private Secretary,

Saya bahru dapat dari Pejabat Tanah Grant Tanah itu No. 158 dan lain lain kertas yang berkenan tersimpan dalam sebuah peti besi lama di-pejabat itu, bersama ini saya kirim-kan kertas2 itu dalam suatu sampol bagi lihatan Dato. Grant yang tersebot itu nampak-nya sudah tergadai oleh Almarhom Ungku Abdulah kepada sa'orang Cheti dalam tahon 1890 dan ditebus oleh Peterson Simmon & Co. bagi pehak Kerajaan Johore dengan membayar $8,000 dalam tahon 1895 kemdian daripada telah mangkat Almarhom Ungku Abdulah itu.

Semenjak dari itu tertinggal-lah Grant itu dalam simpannan Kerjaan dan dalam tahon 1908 barang kali dengan sebab ada sebarang tentutan lawyer Rodyk and Davidson menyatakan yang tanah itu terserah jadi hak and milek Kerjaan kerana telah lebeh dari pada 12 tahon dalam pegangan-nya dan tiada boleh di-tuntut oleh siapa2 lagi. Pada masa ini sekarang sudah jadi 37 tahon lama-nya.

Sunggoh pon demkian itu barang kali juga Dato suka hendak berdatang sumbah kalau2 ada lempah ahsan kebawah Duli yang Maha Mulia di-atas anak2 Almarhom Ungku Abdullah yang bermohon ini.

Ind/- M.S.

State Secretary

12.1.32.

2. The Legal Adviser at that time was consulted and on 21.1.32 gave his opinion that 'the heirs have no claim in law or equity and can only be granted anything as an act of grace'. The matter went before Executive Council and the claim was rejected.

3. The matter *was brought* up again in 1933 and again went *to Executive Council. The claim was again rejected*.

4. In 1949 *the claim was brought* up again by various grandchildren of Ungku Abdullah and you replied that this matter had been *settled long ago and nothing could now be done* about it.

5. In 1950 when it was decided to site the Telecoms. building here Mr. Cunyngham-Brown endorsed on the Malay Grant as follows:-

> This is now State land under Section 54 of the Land Enactment vide CL&M, 18/1932.

No formal enquiry appears to have been held when this was done.

6. The new Telecoms. building is going up on this site.

7. I think that the applicants should be told that this matter was *decided more than* 30 years ago and cannot now be reopened but I suggest you consult the Legal Adviser as to this before referring to Executive Council.

8. I attach my paper CL&M.Conf.18/32 under confidential cover should it be wanted for reference by the Legal Adviser.

(A. Glencross)

COMMISSIONER OF LANDS & MINES,

JOHORE.

27th December, 1953.

[16] The affidavit in reply thus filed on behalf of the appellants incorporates extracts of what is termed as 'public documents' thereby rendering the application of ss 35 and 74 of the Evidence Act 1950 to be considered. Those sections provide:

74 Public documents

The following documents are public documents:

(a) documents forming the acts or records of the acts of —

(i) ...

(ii) ...

(iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and

(b) ...

35 Relevancy of entry in public record made in performance of duty

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[17] Section 74 has been considered by Mokhtar Sidin J (as he then was) in *Dato' Yap Peng v Public Prosecutor* [1993] 1 MLJ 337 at p 349 (HC):

... in my view, s 74 only provides the categorising of a public document and nothing more than that .... The purpose of categorising... is to make it easier for its production without the necessity of calling the maker or the keeper of such document to give in evidence to prove the existence of such document. In my view, that is the only purpose of s 74 ... of the Evidence Act 1950. The relevancy and the admissibility of such a document is governed by the provisions of other sections of the Act or other laws. In my opinion, before such document could be admitted, the conditions and prerequisites of the section under which it is to be used must be satisfied.

[18] Section 74 has also been considered in *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1994] 1 MLJ 592 Vincent Ng JC (as he then was) stated:

..., in my view, the only material point in dispute is whether exh YKS1 comes within the ambit of the exception to the 'best evidence rule', namely, whether secondary evidence is admissible to prove compliance of the said provision of the Act. Encik Karpal Singh cited two conflicting authorities — in both of which there was no appeal. The authorities being *Chiam Ching Kiang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Lain* and *Yeow Boon Kee v Timbalan Menteri Dalam Negeri, Malaysia & Anor*. In *Yeow Boon Kee*'s case, it was held by LC Vohrah J that a duly certified true copy of the report of the reporting officer, who was only away in nearby Indonesia, exhibited in the respondents' affidavit, is admissible under the Evidence Act 1950. Whereas, in *Chiam Ching Kiang*, it was held that a similar report by the reporting officer, who was at the material time in Cambodia, was inadmissible, and this had caused a break in the chain of evidence relating to the authorisation for the detention under the relevant provision.

Section 65 states as follows:

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original is a public document within the meaning of section 74; ...

Section 74 states as follows:

The following documents are public documents:

(a) documents forming the acts or records of the acts of —

(i) official bodies and tribunals; and

(ii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country, and ...

My careful reading of ss 65 and 74 found myself compelled to the conclusion that where the document is a public document, the best evidence rule is inapplicable. Also, further, that secondary evidence may be adduced (as in our current case) not only as to the existence of such document but also as to its contents. I would thus readily agree with LC Vohrah J's judgment in *Yeow Boon Kee*.

[19] Taking into account the law as perused above, the explanation given by the state legal advisor in exh A4 wherein it is stated ' … Tanah tersebut telah di tebus oleh Kerajaan dalam tahun 1895 ...' are statements of facts explaining the status of the land.

[20] The contents of the letter exhibited as exh A4 has also been earlier elucidated in the contents of the letter exhibited as exh A3. Both letters state one common fact namely the land was redeemed 'tebus' in 1895. It is useful to reproduce the contents of exh A3 verbatim:

Kertas Kita: PUNJ.333(155)

27hb Ogos, 1972

Y.M. Ungku Ibrahim bin U. Ahmad,

MM.31142

Balai Polis Di-Raja,

KLUANG, JOHOR.

Ungku,

Per: Menuntut bayaran ganti-rugi atas Geran Melayu No. 158 Bandar Johor Bahru.

Surat Ungku bertarikh 22hb Ogos, 1972 telah patek terima.

2. Patek dukachita menyatakan bahawa satelah patek siasat perkara ini, patek dapati tanah tersebut telah menjadi hak Kerajaan. Almarhom Ungku Abdullah telah menggadaikan tanah itu kapada sa-orang Chetti dalam tahun 1890, dan pada 23.3.1893 telah mangkat. Dalam tahun 1895 Kerajaan telah menebus gadaian itu. Kerajaan telah mengambil aleh tanah itu menjadi hak Kerajaan dan samenjak itu tidak ada apa2 tindakan di-ambil untok meminta balek tanah itu daripada Kerajaan.

3. Di-masa ini tindakan Mahkamah ke-atas Kerajaan tidak boleh di-ambil oleh kerana tindakan2 itu akan di-galang oleh undang2 batasan guaman (Limitation).

Yang ikhlas,

(MOHD. EUSOFF BIN CHIN)

Penasehat Undang2 Negeri, Johor.

[21] There is a reference in the grounds of judgment of the trial judge to a treatise on land law authored by Judith Sihombing entitled *National Land Code, A Commentary*. The relevant passages cited are:

... It is interesting, at this juncture, to refer to a book entitled *'National Land Code, A Commentary', 2nd Ed, by Judith Sihombing* where the learned author painstakingly traced the background history to the present day land law in Peninsular Malaysia. *At p 15, she explained that*:

> The Unfederated Malay States consisted of Kedah, Kelantan, Johore, Perlis and Trengganu.

At p 16, the learned author ventured to go into some detail and she had this to say:

> Land tenure in these Unfederated Malay States, prior to British intervention, was that of early Malay tenure although, other than in Johore, certain incidents may have been those of Thai law. The states enacted Torrens type legislation, for example Johore in 1910 and Kedah in 1913. Some of these statutes were typically Torrens, others were not.
>
> That of Johore was expressly atypical Torrens. In interpreting this 1910 Enactment, Mills J had observed:
>
> > It depends on the terms of the Enactment how far the Legislature intends that people shall be able to rely on the Register. The Johore Enactment is not modelled closely on the Australian Torrens Acts and substantially differs from them. In particular, except in the case of Court sales under section 83 and section 90H, the *Enactment contains no provision conferring indefeasibility of title or State warranty of title* (1936) MLJ 203.
>
> (Emphasis added.)

[22] It is also of interest to note that in the judgment of Mills J cited by the author His Lordship had observed that, with reference to the 1910 Enactment, 'the Enactment contains no provision conferring indefeasibility of title or State warranty of title …'

[23] In a more recent (1998) addition of the same treatise the author further noted at paras 154, 155–200 as follows:

Johore

[154]

Land could be held under Malay customary tenure or by grant directly from

A the Sultan. From the late 19th century, leases of large tracts were granted for 99 years for development purposes; they were liable to a premium on produce, and to quit rent. Town land around Johore Baru could be alienated in perpetuity without cultivation conditions and without the payment of rent.

B

[155]-[200]

In 1910, *Land Enactment* No I was passed to formalize the alienation of state land, dealings in the land and the collection of royalties on forest produce. Many provisions were similar to the land legislation of the C Federated Malay States although there was no provision for indefeasibility. Section 42 provided that no claim or interest was to be valid unless it had been registered in the Land Office. Land could be held on *Surat Sementara* in anticipation of survey, but no dealings were registrable or binding on the state until formal grant.

D

[24] In the book *The Centenary of the Torrens System in Malaysia*, a 1989 publication of the Malayan Law Journal edited by Tan Sri Datuk Profesor Ahmad Ibrahim and Judith Sihombing, there is a part written by the late Tan Sri Datuk Mohamed Zahir, formerly a judge of the High Court Malaya and E Speaker, House of Representatives Malaysia. The parts which are relevant in the context of this appeal are:

2. Early Land Laws in Johore

F A. Introduction

Johore in 1910 enacted a land law entitled Enactment No 1 which repealed any former laws or Orders in Council dealing with the alienation of land and the collection of royalties on forest produce. Under section 3, the Sultan in Council might alienate State lands and might impose any special conditions in respect G thereof. State land was divided into three classes, namely:

(a) Town and village lands;

(b) Country lands of 100 acres in area and under;

(c) Country lands exceeding 100 acres in area.

H *Section 7 provided that:*

The entire property in and control of all rivers, streams and water-courses throughout the State is and shall be vested solely in the Ruler thereof...

I Section 11 provided:

Every title to land under this Enactment shall be deemed to vest in the person entitled thereunder a surface right only in the land to which such title relates, and, in the absence of an express condition to the contrary in such title...

This Enactment also ratified any older documents of title; where an old title described the land inaccurately or without reasonable certainty, the Commissioner was empowered to correct such inaccuracy or uncertainty.

The enactment did not provide for indefeasibility of title, but section 35 provided something close to indefeasibility:

> Every person whose name is recorded in any mukim register as the owner of land in such mukim shall be deemed to have a permanent, transmissible and transferable right, interest and occupancy in his land, subject to the obligations and conditions described in section 26 and 27, and to any special conditions that may have been lawfully imposed in respect of the said land.

B. Indefeasibility

The fact that the Land Enactment did not confer indefeasibility was referred to in *Quah Hong Lian Neo v Seow Teong Teck* in which it was held that a grant in Johore did not confer an indefeasible title on the grantee.

Section 37 provided for powers of the Collector in any dispute over the ownership of any land; the matter would be adjudicated by the Collector under whose jurisdiction the disputed land was. The Collector also could order specific performance of any agreement. Appeals against his decision would lie to the Commissioner and eventually to the Court. Section 39 provided for the compulsory attendance of witnesses before the Collector and these witnesses could be examined on oath.

Section 42 provided that no claim or interest in any land would be valid unless it had been registered in the Land Office. It would appear that the Enactment did not confer any right on a holder of a temporary document of title, a *Surat Sementara*. In *Tan Ho Cher Trading v Yeo Poh* it was held that a person occupying land under a *Surat Sementara* had no registrable interest. This was followed in *Tan Ah Boon v State of Johore* where it was held that the State did not divest itself of its ownership until a grant had actually been issued and registered.

[25] The extracts from books as cited above constitute the inception of matters relating to public history that is allowed pursuant to ss 56 and 57 of Act 1950 the provisions of which are:

> Fact judicially noticeable need not be proved
>
> 56 No fact of which the court will take judicial notice need be proved
>
> 57 Fact of which court must take judicial notice
>
> (1) The court shall take judicial notice of the following facts:
>
> (a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;
>
> ...
>
> (2) In all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate *books or documents of reference*.

(Emphasis added.)

[26] The following are excerpts from *Sarkar on Evidence* (15th Ed, 1999) that furnish explanatory notes, in respect of the aforesaid provisions at pp 1009 and 1010:

> The introduction of the words 'and also in all matters of public history, science or art' into this section, remarks Markby, is very strange. It cannot be meant that the court is to take judicial notice of all such matters. If so, the special provisions as to evidence on points of science or art in s 45 and the further and the special provisions which we shall come to presently in s 60 as to the use of treatises would be unmeaning. What perhaps is meant is that though the parties must obey the law as laid down in ss 45 and 60, the judge may resort for his aid to appropriate books without any restriction. [Markby p 99]. The provisions that the court may resort for its aid to appropriate books, is in advance of English law, under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as an authority (see s 159), yet the books themselves cannot be cited. [Field p 221] ....

At p 1011:

> Appropriate Books etc.—In regard to books or learned treatises, the author must be shown to be properly qualified to make statement upon the subject and so only standard books acknowledged as authorities may be referred to. The court can certainly refer to journals and books of living authors acquainted with such affairs as mentioned in them.

[27] The Laws of the Constitution of Johore dated 14 September 1895 in its translated version includes the following art 13 in the second part:

> 13 Capacity of the State as respects property, contracts and suits
>
> (i) The State has power to acquire, hold and dispose of property of any land and to make contracts.
>
> (ii) The State may sue and be sued.

The term 'State' is defined, inter alia, as the State of Johore. The concept of state ownership of land was therefore already established.

[28] This judgment may run the risk of turning verbose. However since the issue of the keeping of the documents of title by the state has been dwelled upon, for completeness, it necessitates a reference to an article entitled *The Traditional Malay Ruler and the Land: Maxwell's Theory Revisited* published in [1997] 1 MLJ cxxi by Hunud Abia Kadouf, Associate Professor, International Islamic University. While the entire article is directed towards re-examining the treatise of expounded by Maxwell in *The Law and Customs of the Malays*

with Reference to the Tenure of Land (1884) 13 JSMBRAS 75, it is the following analysis that invites notable mention in the context of land ownership by the Sultan:

> ... The importance of Maxwell's theory must be understood as forming theoretical framework for the modern doctrine of the state ownership of land in Malaysia. State ownership of land may have, therefore, grown out from this historical myth that the Malay ruler was the 'absolute proprietor of the soil'. The idea may not be completely out of place if considered within the general context of the Malay Islamic culture. That is so particularly if understood in the light of the doctrine of vicegerency where the concept of regarding the state authority as a custodian of the whole land on behalf of the Muslim community is still a valid norm under Islamic law.

[29] The explanation that may be discerned from Syubanah's affidavit and the exhibits accompanying it provide an amalgam of credible evidence that clarify the status of the land. The historical perspective extracted from the State Constitution and the treatise of authors referred to above also assist to embellish the position that during the period preceding 1910 the Sultan of Johor then HRH Sultan Ibrahim Ibni Sultan Abu Bakar or the State of Johore possesses the legal capacity to hold lands for the state. In this appeal the circumstances are such that the land that was charged to the chettiar by Ungku Abdullah was at the instance of HRH the Sultan restored to the state in order to compensate the chettiar. This fact has not been traversed by the respondents and those acts of restoring the ownership to the state in the absence of any reasonable explanation as to what was done by the ancestors of the respondents cannot be a reason to reprobate the acts of HRH the Sultan and the keeping of the title by the office of Rodyk & Davidson as acts calculated to deprive the ancestors of the respondents of the claimed land. It is also noted that during that period (ie 1895–1910) the law on alienation indefeasibility was then under developed and had not properly evolved. There is also in addition a dearth of explanation as to the steps that may have been taken, if any, by the family of Ungku Abdullah then. The land consequently remained vested with the state.

[30] It is found that there has been a failure to give proper judicial appreciation to the following:

(a) the contents of Syubanah's affidavit in reply,

(b) the account of events detailed by A Glencross,

(c) the historical perspective of the legislation on land,

(d) the explanation in the letters exhibited as exh A3 and A4 that gave an account as to the stages in which the land was finally described as 'diambil alih'.

[31] The act of 'tebus' (redemption) preceded the acts of 'ambil alih' (take over). For a period of 15 years the land remained with the government then. Exhibit SY4 contained, inter alia, the following:

> Encumbrances
>
> (1) Nil
>
> (2) This title has been cancelled

The failure to have a judicial appreciation of the aforementioned matters amounts to a misdirection.

[32] The misdirection is not only in relation to the facts but also his categorical acceptance that the applicable law to ascertain whether the redemption is valid is the Land Enactment (No 1). The learned judge is erroneous in failing to take into consideration the full import of the contents of exh SY1 and in failing to give due regard to exhs A3 and A4. The reasons are as follows.

[33] The matter that was not given consideration here is that while there may have been Land Enactment (No 1) that is discussed in the judgment the preamble to that very land Enactment contains the following:

> To consolidate and amend the law relating to land.

[34] In addition it is obvious also that antecedent to the Land Enactment No 1 (which is published in a revised edition of the laws of 1935) there was the Enactment No 2 of 1910. The state legal advisor has referred us to s 1(ii) of the Land Enactment No 1 which stipulates:

> (ii) *All laws or Orders* in Council dealing with the alienation of land and the collection of royalties on forest produce hitherto in force or *having the effect of law within the State are hereby repealed: provided that, except as herein specially otherwise enacted, nothing shall affect the past operation of such laws or Orders in Council, or of any order made, or the validity or invalidity of anything* done or suffered, or of any right, title or interest created thereunder before the commencement hereof.

[35] The very subsection thus indicates that there may be other legislation prior to 1910. *But what has to be considered here is the period between 1895 and 1910*. It is found that the judge has erred in not directing his mind to this very period namely after the land was said to be redeemed from the chettiar by the directions of HRH the Sultan. The minutes of A Glencross referred to above indicated that land became vested in the government. But was it illegally so vested. The respondents in this appeal did not furnish any

explanation. However the trial judge in disregarding this period preempted the second issue by rejecting the explanation afforded in the exhibits filed by Syubanah in the following terms:

> In 1932 when the Johore State Government took over the said property, the Land Enactment (No 1) was already in existence and it must surely be the guiding force behind all land matters in Johore at that time.
>
> *The preamble to the Land Enactment (No 1) reads as follows:*
>
> > (2 of 1910 was amended by 5 of 1913, 21 of 1919, 8 of 1920, 6 of 1921, 8 of 1921, 5 of 1924, 13 of 1928, 4 and 14 of 1933, 16 of 1934, (*the revised Edition of the Laws Enactment 1934), 8, 16 and 18 of 1936, 15 of 1938, 13 of 1939, 3 of 1941 and Federation of Malaya Ordinance 57 of 1949 and 51 of 1952.)

and it is a legitimate aid in construing the said Enactment (Sussex Peerage Claim (1844) 11 Cl & F 85; Turquand v Board of Trade (1886) 11 App Cas 286; and Powell v Kempton Park Racecourse Co, Ltd [1899] AC 143). Buller J in Crespigny v Wittenoom (1792) 4 TR 790 at p 793 was of the view that when the meaning of an Enactment was unclear then 'the preamble may be resorted to explain it.' The Land Enactment (No 1) was at that time a timely piece of legislation 'to consolidate and amend the law relating to Land' in Johore.

[36] This consequentially has caused the trial judge to assume that the land legislation applicable to the facts of the appeal *has* to be the Land Enactment No 1. This assumption is not correct for the following reason:

(a) The Land Enactment No 1 itself indicates that as at 1910 there was already in place a legislation pertaining to land.

(b) The redemption took place in 1895.

(c) Between 1895 and 1910, 15 years have transpired.

(d) The above premises (a), (b) and (c) essentially raise already the very third issue to be considered that is pertaining to limitation.

[37] It is therefore a fallacy to determine whether Land Enactment No 1 is the appropriate legislation in order to consider the validity of the vesting of the property prior to 1935. The reference to s 54 of the Land Enactment No 1 is irrelevant. That section was indeed invoked by the state authority only for purposes of rectification of the title that is to properly vest the land in the government of the State of Johore. The Land Enactment No 1 *cannot* and does not operate retrospectively unless there are express words to the contrary. This is a rule of statutory interpretation. Moreover it is *trite law* that a matter is decided with the law then in force. Land Enactment No 1 is therefore wrongly considered to be the law applicable to determine the

A legality or otherwise of the alleged 'acquisition'. Consequentially it is also irrelevant to consider the applicability or otherwise of s 42 of the Land Enactment No 1. Any action pursuant to s 54 indicated that it was to regularise the vesting in the state government for purposes of declaring it as land required for public purposes as evidenced by GN 386 10 May 1951 (exh B A5).

[38] There was additionally a failure to take into account the contents of exh SY5. That letter dated 18 July 1975 indicates that an explanation was C afforded that a claim lodged in 1908 had already been rejected, principally, on account of limitation.

[39] Owing to the misdirection that has occurred in accepting that the Land Enactment No 1 is the appropriate legislation to consider, it is found D that the judge went on further to another misdirection in determining that the law of limitation does not apply. Regrettably in this appeal it is found that both the appellants and respondents were again off tangent in referring to the Limitation Act 1953.

E

[40] The issue of limitation was, as indicated above, also dealt with in the minutes of A Glencross and in the letters of both the state legal advisors. Factually the property was redeemed in accordance with the law then in force. The respondents have failed to adduce any evidence to show that the F redemption was improper. There is an explanation that a document was kept by Rodyk & Davidson. But the respondents themselves are unable to furnish any reasonable explanation other than to allege that the land was unlawfully vested with the Sultan or the state. The learned trial judge in his own words observed 'the episode took place 106 years'. Yet in relation to the protracted G period his approach was already fixated by the averments in Ungku Sulaiman's first affidavit as demonstrated when he said:

> ... Both the applicants admitted that there was delay in their claim against the government and they elaborated further. They said that since the government had H acquired the said property, no action was initiated for the return of the said property because at the material time the immediate beneficiaries did not know who held the land title to the said property upon the death of Ungku Abdullah. Both the applicants further deposed that they verily believed that the beneficiaries were financially ill disposed and were reluctant to obtain probate on Ungku Abdullah's assets. Of crucial importance, *it was deposed that at that time almost* I *everyone was afraid of His Royal Highness Sultan Ibrahim Ibni Sultan Abu Bakar*. Members of the royal family who had received pensions from the royal coffers were afraid that *His Royal Highness Sultan Ibrahim Ibni Sultan Abu Bakar* would revoke their royal pensions that were due to them. It was deposed and it was common knowledge that members of the royal family were on several occasions threatened

that their royal pensions which they received would be revoked if they were to do anything that would incur the wrath of *His Royal Highness*. Such was the fear that was felt by members of the royal family. A

[41] Clearly the averments of the respondents on what was alleged of the Sultan and the reasons for delays in pursuing their claim as stated in Ungku Sulaiman's affidavit are total hearsay not supported by any other evidence. On the contrary the minutes of A Glencross reveal that on several occasions the State was approached by the descendants of Ungku Abdullah and the status of the land was already explained. However a different stance was taken on the issue of limitation where a contrasting and somewhat astonishing observation was made by the trial judge. B C

... When the said property was purportedly acquired on 24 October 1950, time remained still and the rigours of the law of limitation was not activated at all. In fact the law of limitation was not applicable to the facts of the present case. In so holding, I must impose a caveat. I am not extending nor postponing the limitation period in favour of the applicants. *This was a case where the law of limitation plays no part at all. In 1895 when the Johore State Government redeemed the said property it was an act of benevolence: very friendly, very helpful and very charitable gestures — notwithstanding the fact that the beneficiaries of the late Ungku Abdullah were not told nor were their consents obtained before the redemptions was undertaken*. After the said property had been redeemed in 1895, the Johore State Government purportedly held the title to the said property in total disregard to the legal rights of the beneficiaries of the late Ungku Abdullah. Surely the beneficiaries of the late Ungku Abdullah ought to be recognised by the Johore State Government when the said property was redeemed in 1895; they should not be side stepped since they are entitled, in law, to the estate of the late Ungku Abdullah. D E F

[42] The issue of limitation was addressed in great length. It is found that references are made to irrelevant provisions. But the basic question remain, that is, what is the legislation that is to be taken into consideration. G

[43] The issue of the effect of a repeal has recurred. The Limitation Act 1953 contains ss 34 and 35 that expressly stipulate, inter alia: H

Provisions as to actions already barred and pending actions

34 Nothing in the Act shall —

(a) enable any action to be brought which was barred before the commencement of this Act by any Ordinance or Enactment repealed by this Act, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Act; or I

A (b) affect any action or arbitration commenced before the commencement of this Act or the title to any property which is the subject of any such action or arbitration.

Repeal

B 35 The Ordinance and the Enactment specified in the Schedule to this Act are repealed.

[44] Section 35 provides for the repeal of state Enactments including C Johore Enactment No 23: The Limitation Enactment.

[45] This is a situation where in order to ascertain if any right or action has been preserved or barred the legislative intention is to be evinced from s 34.

D **[46]** The preamble to Enactment 23 cites that it is 'to provide for the limitation of suits'. On the right hand corner of the text of the Enactment within brackets are the figures and word (5 of 1915). Enactment 23 like Enactment No 1 comprises part of the series of the legislation of the Unfederated State of Johore then. The laws of 1935 of which Enactments E No 1 and No 23 form a part are revised laws. The relevant legislation to be taken into account in order to consider whether the claimed property could no longer be the subject of claim is therefore not the Limitation Act 1953.

F **[47]** Once again it is the repealed legislation that is the Limitation Enactment No 23 that is material. However if 1915 is the year that it was introduced it is still pertinent to observe that in 1915 it is already 20 years after 1895. Section 3 of Part II of Enactment No 23 provides:

G LIMITATION OF SUITS

3 Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted after the period of limitation prescribed therefor by the Schedule hereto shall be dismissed: provided that limitation has been set up as a defence.

H That section read with the relevant part of the Schedule is as follows:

THE SCHEDULE—continued.

Description of suit.	Period of limitation.	Time from which period begins to run.

I

110. For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	PART V. continued. Twelve years.	The date of the dispossession or discontinuance.
111. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	do.	When the forfeiture is incurred or the condition is broken.
112. For possession of immovable property or any interest therein not hereby otherwise specially provided for.	do.	When the possession of the defendant becomes adverse to the plaintiff.

[48] 12 years seem the number of years when the limitation period could have set in. Yet the Notice of Motion 25–31 of 1998 was filed only in 24 September 1998 104 years later. In heedless disregard of the advice from the state legal advisor then, as evidenced in the letter reproduced verbatim below, a misconceived position was taken with regard to the land. This is attributed to the position perpetuated by the contents of letters dated 31 October 1971, 23 August 1994 and 23 January 1998 from legal firms all taking the unreserved position that the 'Kerajaan telah mengambil alih', implying acquisition is only effective at the date stated in those letters. The erroneous view is held as far back as 31 October 1971 as exemplified by the contents of the letter of that date. The contents are:

> Surat kami: H056/HY/JB
>
> 31hb. Oktober, 1971
>
> Pengarah Tanah dan Galian Johor,
>
> Bangunan Pejabat Kerajaan,
>
> Johore Bahru.
>
> Tuan,
>
> Per: Menuntut bayaran ganti-rugi atas
>
> Geran Melayu No. 158, Bandar
>
> Johore Bahru.
>
> Kami mewakili mereka-mereka yang tersebut dibawah ini:-
>
> Y.M. Ungku A. Majid bin Ibrahim, Y.M. Ungku Hejah Rugayah bte Ibrahim, Y.M. Ungku Maimunah bte Ibrahim, Y.M. Ungku Zabedah bte Ali, Y.M. Ungku Bukit bte Ali, Y.M. Ara bte Ali, Y.M. Ungku Sonit bte Mohamed, Y.M. Ungku Esah bte Hussin. Y.M. Ungku Radwan bte Ali, Y.M. Ungku Hawa bte Ali.

Pelanggan kami tersebut di-atas ia-lah chuchu2 kapada Allah Yarham Yang Mulia Tengku Abdullah bin Temenggong Ibrahim.

Kami telah di-arahkan menulis kapada tuan mengenai tanah tersebut di-atas dengan tujuan agar Kerajaan menentukan dengan khus kedudokan tanah tersebut.

Menurut bokti yang tertulis di-dalam Geran tersebut, tuan punya tanah di-daftarkan ia-lah Yang Mulia Ungku Abdullah. Walau bagaimanapun ada terchatet di-sabahagian belakang-nya saperti berikut:-

> This is now State Land under Section 54 of the Land Enactment. Vide C.L.&M18/1932. Dated this 24th October, 1950, C.L.&M 226/1950.

Seksyen 54 yang di-maksudkan di-atas berbunyi:-

> Sec. 54(i) Any person claiming any estate or interest in land under this Part may, at any time, if his claim cannot be properly dealt with under Section 42, apply to the Commissioner for an order that any register, book or journal kept at any Land Office under this Enactment shall be rectified, or that any entry may be made or interpolated in any such register, book or journal or that any entry therein may be cancelled: and the Commissioner may either refuse such application, or, if satisfies as to the justice of the case, may make such order in reference thereto as he may think fit.
>
> (ii) The Collector and every other person affected by such order of the Commissioner shall obey the same upon being served with a copy of such order.
>
> (iii) Any person aggrieved by any refusal or order of the Commissioner under sub-section (i) may appeal to the Court: provided that such appeal shall not be admitted after the expiration of thirty days from the date of the decision appealed against.
>
> (iv) No Court other than the Supreme Court shall have any jurisdiction in matters provided for by this action.

Menurut fahaman kami maksud Sekshen 54 di-atas ia-lah satu chara membetulkan kesilapan yang terchatet di-dalam Buku Pendaftaran Tanah dan khusus-nya tindakan yang boleh di-ambil sa-kira-nya terdapat satu2 kesilapan atau kesalahan yang tertentu.

Ternyata di-sini, tidak ada termaktob kuasa yang membolehkan Kerajaan mengambil tanah tersebut tanpa pengetahuan ampunya tanah atau waris-nya.

Bagaimana-kah tanah tersebut boleh di-jadikan State Land di-bawah Sekshen tersebut? Kami tidak nampak bagaimana Kerajaan boleh mengambil tanah tersebut dan dengan tidak memberi peluang kapada ampunya terhadap tanah tersebut.

Sa-tahu kami tanah tersebut telah pun di-pindah milek oleh Kerajaan Negeri Johor kapada Kerajaan Persekutuan di-mana sekarang telah dibina Jabatan Telecoms.

Sa-hingga hari ini tidak ada apa-apa bayaran yang di-buat oleh Kerajaan kapada ampunya tanah atau keluarga2-nya.

Yang benar,

Salinan kapada:

(1) Dato Setia Usaha Kerajaan Johor, Johore Bahru.

(2) Penasehat Undang2 Negeri Johor, Johore Bahru. '

The above letter showed that the claim was primarily hinged on s 54 of the Land Enactment No 1.

[49] The assertion that s 54 is applicable was echoed several times by the respondents. The claim henceforth originated from a misconceived position. On the totality of evidence as appraised above the respondents have failed on the balance of probabilities that there had occurred an illegal deprivation of title to land. Their very position as the alleged deserving successors are also in undivided portions and bits.

[50] Unfortunately there has been occasioned a wrong exercise of discretion to grant a declaration relating to circumstances which have been rendered otiose through the passage of time and legislation. The claim has become in effect academic in character.

[51] For the reasons stated above this appeal has been unanimously allowed with costs. The entire orders of the High Court are set aside. The deposit is to be refunded to the appellants.

Appeal allowed with costs.

Reported by Kohila Nesan